

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Aug 31, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PAMELA LYNCH,

Plaintiff,

v.

ETHICON INC., ETHICON LLC, and
JOHNSON & JOHNSON,

Defendants.

No. 2:20-cv-00217-SMJ

SCHEDULING ORDER

A telephonic status conference was held in the above-entitled matter on **August 27, 2020**. Joseph A. Grube and Philip M. Pasquarello appeared on behalf of Plaintiff. Anita Modak-Truran, Angelo J. Calfo and Lindsey Erin Mundt appeared on behalf of Defendants. The parties filed a Joint Status Report, ECF No. 80. The Court, having reviewed the documents in the file and discussed the adoption of a scheduling order with counsel, now enters the following Scheduling Order. The dates set forth in this Order may be amended **only** by Order of the Court and upon a showing of good cause.

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IT IS ORDERED:

1. Briefing Schedule

A. Defendants' Motion for Summary Judgment, **ECF No. 37** shall be noted without oral argument for **October 16, 2020**. All briefing has been submitted by the parties.

B. Defendants' Motion to Exclude Expert Opinions of Dr. Bailey, **ECF No. 39**, shall be noted without oral argument for **September 28, 2020**.

i. Plaintiff's response, if any, shall be filed no later than **September 10, 2020**;

ii. Defendants' reply, if any, shall be filed no later than **September 17, 2020**.

C. The parties shall file their discovery motions relating to a supplemental deposition of Plaintiff and the Independent Medical Examination of Plaintiff by Plaintiff's expert, discussed in the joint status report, ECF No. 80, and the telephonic scheduling conference, no later than **October 12, 2020**. Responses and replies shall be filed and served according to Local Civil Rule 7.

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1 **2. Rule 26(a)(1) Exchange**

2 The parties have completed their exchange of Federal Rule of Civil
3 Procedure 26(a)(1) material.

4 **3. Mediation by Federal Magistrate Judge**

5 If the parties have not reached a resolution by **August 20, 2021**, the Court
6 will refer this matter to **Magistrate Judge Dimke** for settlement purposes. In
7 addition, the parties shall file a status report by **August 27, 2021** regarding the
8 settlement process.

9 If the parties would like to pursue mediation before a Federal Magistrate
10 Judge at an earlier date, the parties shall file an appropriate motion with the Court.
11 However, if the parties elect to engage in private mediation, the mediation must be
12 **completed** no later than ninety (90) days prior to trial.

13 **4. Add Parties, Amend Pleadings, and Class Certification**

14 The deadline to add parties, amend the pleadings, or file any motion for class
15 certification has passed.

16 **5. Rule 26(a)(2) Expert Identification and Reports**

17 The deadline for the parties to identify experts and provide reports has passed.

18 **6. Discovery Cutoff**

19 **A. Generally**

20 All discovery, including depositions, perpetuation depositions, and fact and

1 case-specific expert discovery, shall be completed by **August 6, 2021** (“Discovery
2 Cutoff”). The parties shall not file discovery on CM/ECF except those portions
3 necessary to support motions or objections.

4 **B. Interrogatories, Requests for Production, and Requests for**
5 **Admission**

6 All interrogatories, requests for production, and requests for admission shall
7 be served on the opposing party no later than seventy (70) days prior to the
8 Discovery Cutoff. Requests for production shall be limited to thirty (30) requests,
9 including subsections. A party needing relief from this limitation should seek relief
10 from the Court by motion.

11 **C. Protective Orders**

12 All motions for protective orders must be filed and served no later than forty
13 (40) days prior to the Discovery Cutoff.

14 **D. Motions to Compel**

15 All motions to compel discovery must be filed and served no later than thirty
16 (30) days prior to the Discovery Cutoff.

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E. Additional Deadlines

The parties have agreed in their joint status report to the following additional deadlines:

- i.* Plaintiff shall serve an updated Plaintiff Fact Sheet and updated authorizations by **October 15, 2020**;
- ii.* Defendants shall serve an updated Defendants Fact Sheet by **November 16, 2020**;
- iii.* Discovery relating to fact witnesses, including depositions, shall be completed by no later than **March 15, 2021**;
- iv.* The supplemental report, if any, of Plaintiff's previously designated case-specific expert, shall be completed by **April 15, 2021**;
- v.* The supplemental report, if any, of Defendants' previously designated case-specific expert, shall be completed by **May 17, 2021**.
- vi.* Depositions on supplemental reports, if any, of case specific experts shall be filed and served on or before **July 16, 2021**.

7. Notice of To-Be-Adjudicated Claims and Affirmative Defenses

Each party shall file and serve a notice **no later than one (1) week after the Discovery Cutoff** indicating which previously-plead claims and/or affirmative

1 defenses will be adjudicated at trial.

2 **8. Dispositive and *Daubert* Motions**

3 **A. Generally**

4 All dispositive and *Daubert* motions shall be **FILED AND SERVED** on or
5 before **September 15, 2021**. Responses and replies to dispositive and *Daubert*
6 motions shall be filed and served according to Local Civil Rule 7. No supplemental
7 responses or supplemental replies to any dispositive or *Daubert* motions may be
8 filed unless the Court grants a motion to file such documents.

9 The parties' shall refile their *Daubert* motions previously filed in the MDL
10 Court and provide the Court with background of MDL prior rulings on these
11 motions. These *Daubert* motions shall be REFILED within **60 days** after the Court
12 has issued an Order on Defendants' Summary Judgment, ECF No. 37.

13 **B. Statement of Uncontroverted Facts**

14 The parties shall also file a Joint Statement of Uncontroverted Facts **no later**
15 **than three (3) days** (excluding federal holidays and weekends) after service of the
16 reply, with a courtesy copy emailed to MendozaOrders@waed.uscourts.gov.

17 **C. Notice of Hearing**

18 Dispositive and *Daubert* motions shall be noted for hearing at least **fifty (50)**
19 **days** after the date of filing. The parties will receive only one (1) hearing date per
20 month for dispositive motions of up to five (5) issues per party.

1 **9. Multidistrict Litigation Deadline**

2 All motions to be **refiled** from the MDL, except refiled *Daubert* motions,
3 shall be **FILED AND SERVED** on or before **January 15, 2021**. Responses and
4 replies shall be filed and served according to Local Civil Rule 7. No supplemental
5 responses or supplemental replies to any refiled motions may be filed unless the
6 Court grants a motion to file such documents.

7 **10. Certification to the State Supreme Court**

8 The parties must identify any issue of liability or damages which should be
9 certified to the Washington State Supreme Court no later than the date for the filing
10 of dispositive motions.

11 **11. Motion Practice**

12 **A. Notice of Hearing**

13 All matters requiring Court action must be filed and noted for hearing in
14 accordance with Local Civil Rule 7. This includes stipulated or agreed motions and
15 proposed orders. If a party seeks oral argument, counsel shall contact the Courtroom
16 Deputy at 509-943-8173 to obtain a hearing date and time. **Absent exceptional**
17 **circumstances, all hearings with oral argument will occur in Court and not by**
18 **telephone or video conference.**

19 **B. Witness Testimony**

20 At any hearing, including trial, in which witness testimony is given, the

1 witness must testify in Court and may not appear by telephone or video conference,
2 absent exceptional circumstances.

3 **C. Citing Previously-Filed Documents**

4 When a party references a document previously filed with or by the Court,
5 the party shall cite to the document by the record number given to the document by
6 the Clerk of the Court (e.g., ECF No. 43). Furthermore, because the Court is able to
7 easily review previously-filed court records, no such documents shall be attached
8 as exhibits to any filing.

9 **D. Reliance on Deposition Testimony**

10 When a party relies on deposition testimony to support a position it takes in
11 support or opposition to an issue, that party shall provide the Court with only the
12 pertinent excerpts of the deposition testimony relied upon and shall cite to page and
13 line numbers of the deposition it believes supports its position. *See generally* LCivR
14 56(c)(1), (e). Submission of the entire deposition and/or failure to cite to specific
15 portions of the deposition may result in the submission being stricken from the
16 record. *See Orr v. Bank of Am*, 285 F.3d 764, 774–75 (9th Cir. 2002).

17 In addition, if both parties submit excerpts from the same deposition, they
18 shall meet and confer to develop a “master” deposition submission, which identifies
19 for the Court the deposition excerpts relied upon by each party. Plaintiff shall
20 highlight excerpts in yellow and Defendants shall highlight excerpts in blue;

1 testimony relied upon by both parties shall be underlined. Master deposition
2 submissions shall be filed no later than three (3) days after service of the reply.

3 ***E. Supplemental Responses or Replies***

4 No supplemental responses or supplemental replies to any motion may be
5 filed unless the Court grants a motion to file such documents.

6 ***F. Motions to Reconsider***

7 Although motions to reconsider are disfavored, any such motion shall be filed
8 no later than fourteen (14) days after the filing date of the order that is the subject
9 of the motion, and shall be noted for hearing **without oral argument**. No responses
10 or replies to motions to reconsider shall be filed unless the Court expressly requests
11 responses or replies. Counsel shall follow Civil Rule 7(h) of the Local Rules for the
12 United States District Court for the Western District of Washington. **Motions to**
13 **reconsider shall not exceed five (5) pages.**

14 ***G. Requests to Strike Material Contained in Motion or Briefs***

15 Requests to strike material contained in or attached to submissions of
16 opposing parties shall not be presented in a separate motion to strike, but shall
17 instead be included in the responsive brief, and will be considered with the
18 underlying motion. The single exception to this rule is for requests to strike material
19 contained in or attached to a reply brief, in which case the opposing party may file
20 a surreply requesting that the Court strike the material, subject to the following: (i)

1 that party must file a notice of intent to file a surreply as soon after receiving the
2 reply brief as practicable; (ii) the surreply must be filed within five (5) days of the
3 filing of the reply brief, and shall be strictly limited to addressing the request to
4 strike; any extraneous argument or a surreply filed for any other reason will not be
5 considered; (iii) the surreply shall not exceed three (3) pages; and (iv) no response
6 shall be filed unless requested by the Court.

7 This does not limit a party's ability to file a motion to strike otherwise
8 permitted by the Federal Rules of Civil Procedure, including Rule 12(f) motions to
9 strike material in pleadings. The term "pleadings" is defined in Rule 7(a).

10 **H. Decisions on Motions**

11 The parties and counsel may call the Judge's chambers at 509-943-8160 to
12 inquire about the status of a decision on a motion if the Court has not issued an
13 order within thirty (30) days of the motion's hearing date.

14 **12. Witness and Exhibit Lists**

15 Witness and exhibit lists shall be filed and served, and exhibits shall be made
16 available for inspection or copies shall be provided to the parties, no later than
17 **November 5, 2021.**

18 **A. Witness Lists**

19 Witness lists shall include a brief description of the witness, a brief summary
20 of the witness's anticipated testimony, whether the witness will be called as an

expert, and any known trial date or time conflicts that witness has.

B. Exhibit Lists

Exhibit lists shall include a brief description of the exhibit. Additionally, all exhibits shall be pre-marked for identification; exhibits for Plaintiff shall be numbered 1–499, and exhibits for Defendants shall be numbered 500–999.

C. Objections

Objections to witnesses or exhibits shall be filed and served on or before **November 12, 2021, and shall be heard at the pretrial conference.** All objections to witnesses shall set forth a legal basis and explanation for the objection. Objections to an exhibit, or portion thereof, shall be accompanied by a full and complete copy of the exhibit in question and a short legal explanation for the objection. The party seeking admission of the witness or exhibit has five (5) days, excluding federal holidays and weekends, to file a response to the opposing party's objection; no reply shall be filed.

D. Exhibits Without Objection

Counsel shall prepare and file a list of all exhibits which will be admitted without objection no later than **December 29, 2021.**

E. Exhibits for Jury Deliberations

Only those exhibits admitted and used during trial will be given to the jury during deliberations.

1 **13. Deposition Designations**

2 **A. Generally**

3 Designation of substantive, as opposed to impeachment, deposition or prior
4 testimony to be used at trial shall be highlighted—in yellow by Plaintiff or in blue
5 by Defendants—and each party shall serve a complete, highlighted transcript of the
6 deposition or prior testimony on or before **November 5, 2021**.

7 **B. Cross-Designations**

8 Cross-designations shall be highlighted—in yellow by Plaintiff or in blue by
9 Defendants—in the transcript containing the opposing party's initial designations,
10 and shall be served on or before **November 19, 2021**.

11 **C. Objections**

12 All objections to designated deposition or prior testimony and the legal bases
13 for the objections, shall be filed and served on or before **November 26, 2021**. Any
14 designated deposition or prior testimony objected to shall be underlined in black in
15 a complete yellow and blue highlighted copy of the deposition or prior testimony
16 transcript described above. A paper copy of the underlined document shall be filed
17 and served with the objections. The party seeking admission of the testimony has
18 five (5) days, excluding federal holidays and weekends, to file a response; no reply
19 shall be filed. If the deposition was video recorded and the recording is to be used
20 at trial, the party seeking to use the recorded deposition shall indicate the relevant

1 portion on both the written transcript and the recording. Similarly, objections shall
2 be made on the written transcript as explained above along with the applicable time
3 stamp on the video recording noted. All objections to deposition and prior testimony
4 designations shall be heard and resolved at the pretrial conference with the video
5 recording available for display.

6 **14. Motions *in Limine***

7 All unresolved substantive or evidentiary issues that may foreseeably arise
8 during trial shall be addressed by motions *in limine* to be filed and served on or
9 before **November 12, 2021**. Such motions will be addressed and resolved at the
10 pretrial conference. However, motions *in limine* may not reargue issues already
11 decided by the Court.

12 **15. Pretrial Order**

13 **A. Generally**

14 A Joint Proposed Pretrial Order prepared in accordance with Local Civil Rule
15 16(e) shall be filed on or before **November 23, 2021**. Counsel are instructed to
16 email the proposed order, in Microsoft Word or text-only format, to
17 MendozaOrders@waed.uscourts.gov.

18 **B. Exhibit List**

19 The list of exhibits contained in the Joint Proposed Pretrial Order shall reflect
20 the exhibit marking scheme described above. In preparing the Joint Proposed

1 Pretrial Order, the parties shall confer regarding duplicative exhibits and determine
2 which party will submit such exhibits for trial.

3 **16. Pretrial Conference**

4 An **in-person** pretrial conference will be held at **9:00 A.M.** on **December 7,**
5 **2021**, in **Spokane**, Washington. All counsel trying the case must be present at the
6 pretrial conference.

7 **17. Trial Briefs, *Voir Dire*, and Jury Instructions**

8 **A. Generally**

9 Trial briefs, requested *voir dire*, and joint proposed jury instructions shall be
10 filed and served on or before **December 29, 2021**.

11 **B. Requested *Voir Dire***

12 Each party shall file suggested questions for the Court to ask during *voir dire*.

13 **C. Trial Brief Length**

14 Trial briefs shall not exceed twenty (20) pages without prior Court approval.
15 To obtain such approval, a party must file a motion to file an over-length brief,
16 demonstrating good cause why supplemental briefing is necessary.

17 **D. Jury Instructions**

18 The parties' joint proposed jury instructions shall be presented in the
19 following format:

20 *(i) "Table of Contents"*

1 This section shall list the proposed instructions by number, brief title or
2 subject-matter, and authority, i.e., Ninth Circuit model instruction number, statute
3 citation, or case citation.

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5 (ii) “Section I: Preliminary Instructions”

6 This section shall include the language of all instructions the parties would
7 like the Court to provide prior to opening statements, including a “statement of the
8 case” and “undisputed facts” instructions. One (1) instruction per page if possible,
9 with citation to the authority for the instruction.

10 (iii) “Section II: Final Instructions”

11 This section shall include the language for all instructions the parties would
12 like the Court to provide prior to closing arguments. One (1) instruction per page if
13 possible, with citation to the authority for the instruction. A party proposing an
14 instruction that differs from a Ninth Circuit model instruction should submit a
15 memorandum analyzing cases suggesting that modification and providing copies of
16 pertinent cases and a proposed instruction incorporating the modification. The final
17 instructions section shall, at a minimum, include instructions regarding the elements
18 of each claim or defense and the relief sought, and shall otherwise comply with
19 Local Civil Rule 51(a).

20 (iv) “Section III: Verdict Form”

1 This section shall include a proposed verdict form.

2 ***E. Individually Proposed Jury Instructions***

3 If the parties are unable to agree on certain instructions, they are to submit
4 individually proposed jury instructions no later than the date the joint proposed
5 instructions are due. All individually submitted proposed instructions must adhere
6 to the format described above for joint proposed instructions and not include
7 instructions the parties are in agreement on.

8 ***F. Objections***

9 Any objections to the opposing party's individually submitted proposed
10 instructions must be filed no later than five (5) days, excluding federal holidays and
11 weekends, after the individual proposed instructions were filed. All objections shall
12 set forth the basis for the objection and briefly explain why the instruction in
13 question should not be used or should be altered.

14 ***G. Courtesy Copies***

15 Counsel are instructed to email courtesy copies of their joint and individually
16 proposed jury instructions, in Microsoft Word or text-only format, to
17 MendozaOrders@waed.uscourts.gov.

18 **18. Trial**

19 The estimated **10-day JURY TRIAL** shall commence at **9:00 A.M.** on
20 **January 10, 2022**, in **Spokane**, Washington. The **final** pretrial conference will

1 begin at **8:30 AM**.

2 **19. General Court Protocol**

3 **A. Conduct of Counsel**

4 Counsel are to read and abide by Local Civil Rule 83.1 and Washington Rule
5 of Professional Conduct 3.4.

6 **B. Exhibits at Hearings**

7 In accordance with Local Civil Rule 83.1(f), each party shall bring to any
8 hearing on the merits, photocopies of their relevant pre-marked exhibits for the
9 Court, opposing counsel, and testifying witness, unless it is not possible to do so
10 because of the nature of an exhibit.

11 **C. Exhibits for Trial**

12 As the Court now utilizes JERS (Jury Evidence Recording System) during
13 trial, counsel shall submit two (2) weeks prior to trial all proposed exhibits on a
14 digital video disc (“DVD”) or compact disc (“CD”). The disc shall be labeled with
15 the title of the case and the name of the party for whom the exhibits are submitted.
16 A hard copy of the party’s exhibit list that includes the electronic file name for each
17 exhibit shall be submitted with the DVD or CD. Unless otherwise directed by the
18 Court, the disc will not be returned to counsel. The parties shall be prepared, as is
19 the usual practice, to submit hard copies of any exhibit admitted during trial.
20 Counsel shall contact the Courtroom Deputy, Nicole Cruz, at least one (1) week

prior to the pretrial conference to discuss the JERS system.

D. Time Sensitive Material

Any time-sensitive materials should be faxed to the Judge's chambers at 509-943-8161.

E. Emailing the Court

Whenever a party emails documents, as required by the Court, to MendozaOrders@waed.uscourts.gov, those documents shall be in Microsoft Word or text-only format. Additionally, the subject line of the email shall be as follows: [Case Name; Case Number; Document Title; Label for Attached Document].

20. Summary of Deadlines

Rule 26(a)(1) exchange	Completed
Deadline to add parties, amend pleadings, and file for class certification	Completed
Rule 26(a)(2) expert reports produced to other parties and emailed to the Court: Plaintiff – Initial Experts: Defendants – Initial Experts: Plaintiff – Rebuttal Experts:	Completed Completed Completed
All interrogatories, requests for production, and requests for admission, served	70 Days Before Discovery Cutoff
Motions for protective orders filed	40 Days Before Discovery Cutoff
Motions to compel discovery filed	30 Days Before Discovery Cutoff
Discovery Cutoff	August 6, 2021
Defendants' Motion to Exclude Expert Opinions Dr. Bailey, ECF No. 39 Response: Reply:	September 10, 2020 September 17, 2020

1	Discovery Motions re medical examination of Plaintiff and supplemental deposition of Plaintiff:	October 12, 2020
2	Plaintiff provide updated Fact Sheet:	October 15, 2020
3	Defendant provide updated Fact Sheet:	November 16, 2020
4	Refiling of Motions for the MDL exclusive of <i>Daubert</i> motions:	January 15, 2021
5	Discovery Deadline for Fact Witnesses, including depositions:	March 15, 2021
6	Deadline for Supplemental report, if any, of Plaintiff's designated case	April 15, 2021
7	specific expert:	
8	Defendants' designated case	May 17, 2021
9	specific expert:	
10	Deadline for depositions on supplemental reports, if any, of case specific experts:	July 16, 2021
11	Notice of to-be-adjudicated claims and affirmative defenses filed	1 Week After Discovery Cutoff
12	All dispositive, <i>Daubert</i> , and state certification motions filed	September 15, 2021
13	Witness and exhibit lists:	
14	Lists filed and served:	November 5, 2021
15	Objections filed and served:	November 12, 2021
16	Deposition designations:	
17	Designated transcripts served:	November 5, 2021
18	Cross-designations served:	November 19, 2021
19	Objections filed and served:	November 26, 2021
20	All motions <i>in limine</i> filed	November 12, 2021
	Joint Proposed Pretrial Order filed and emailed to the Court	November 23, 2021
	Confer with Courtroom Deputy regarding JERS	1 Week Before Pretrial Conference
	PRETRIAL CONFERENCE	December 7, 2021 9:00 A.M. - Spokane
	Trial briefs, jury instructions, verdict forms, requested <i>voir dire</i> , and list of exhibits admitted without objection, filed and emailed to the Court	December 29, 2021


Exhibits for trial	2 Weeks Before Trial
Referral to Magistrate Judge	August 20, 2021
Mediation, if any, must be completed by	90 Days Before Trial

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JURY TRIAL	January 10, 2022 9:00 A.M. - Spokane
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IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to all counsel.

DATED this 31st day of August 2020.


 SALVADOR MENDOZA, JR.
 United States District Judge